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No. 85-41

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

WESTIN, INC.,

Petitioner,

vs.

BLC INSURANCE COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Minnesota

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RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Does a foreign state tavern which purchases goods and services in Minnesota and actively solicits Minnesota residents as customers by way of regular advertising in Minnesota have the requisite minimum contacts for the exercise of personal jurisdiction by a Minnesota court when the advertising successfully lures Minnesota residents to the tavern where they are negligently served alcoholic beverages and they suffer injury as a result upon their return to Minnesota?

PARTIES

The parties to the proceedings below are the petitioner, Westin, Inc., and the respondent, BLC Insurance Company. BLC Insurance Company is an Iowa corporation that is a subsidiary of BLC Investment Company. BLC Investment Company is wholly owned by Bankers Life Company of Des Moines, Iowa.

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vs.

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On Petition for a Writ of Certiorari to the
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RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

I.

Procedural History

Respondent BLC Insurance Company ("BLC") is an Iowa corporation licensed to do business in Minnesota. Petitioner Westin, Inc. is a Wisconsin corporation that operates Dibbo's Bar in Hudson, Wisconsin. BLC brought this action against petitioner in Minnesota state court for contribution to settlements BLC made to persons injured in a fatal auto accident that occurred in Minnesota. After some discovery, petitioner moved to dismiss BLC's claim

for lack of personal jurisdiction. Treating petitioner's motion as a motion for summary judgment,[1] the trial court found that its exercise of jurisdiction would violate Due Process and entered judgment on petitioner's behalf. Pet. App. C-1-8. The Minnesota Court of Appeals reversed, finding that petitioner had sufficient contacts with Minnesota to satisfy Due Process. Pet. App. B-1-6. The Minnesota Supreme Court declined to review the matter further.[2] Pet. App. A-1.

II.

Facts

On March 28, 1981, eighteen-year-old Minnesota resident Robert Messetler and two teenage companions from Minnesota drove to petitioner's Dibbo's Bar in Hudson, Wisconsin. Hudson is a border city on the east side of the St. Croix River, the boundary between Minnesota and Wisconsin, and is approximately fifteen miles east of the outskirts of the Minneapolis-St. Paul metropolitan area. After taking advantage of Wisconsin's lower legal drinking age[3] and after negligently being served liquor at Dibbo's, the teenagers

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[1]The trial court treated petitioner's motion to dismiss as a motion for summary judgment pursuant to Minn. R. Civ. P. 12.02 and 12.03. These provisions, which are similar to F. R. Civ. P. 12(b) and 12(c), convert pre-responsive pleading motions and motions for judgment on the pleadings into motions for summary judgment when the court is presented with matters outside the pleadings and does not exclude those matters from its consideration.

[2]Because the Minnesota Supreme Court declined to review this case, petitioner should be seeking a writ of certiorari addressed to the Minnesota Court of Appeals rather than to the Minnesota Supreme Court, as the Court of Appeals was the highest state court in which a decision could be had. *See* 28 U.S.C. § 1257 (1984); *Faretta v. California*, 422 U.S. 806, 812 (1975).

[3]Wisconsin's drinking age at the time of this incident was 18; Minnesota's was 19. *See* Wis. Stat. §§ 176.30 & 176.31 (1979-80; Minn. Stat. § 340.73 (1984).

returned to Messetler's car and drove back to Minnesota. At about 1 a.m. on March 29, Messetler's automobile collided head-on with another car near Stillwater, Minnesota. Messetler was killed; his blood alcohol concentration at the time of the collision was 0.21.[4] Messetler's passengers and the driver of the other car were seriously injured.

Prior to and at the time of Messetler's death, petitioner was advertising its tavern business heavily on KQRS-FM, a Minneapolis-St. Paul radio station whose target audience is the 18- to 30-year-old age group. KQRS-FM's signal covers a circular radius of approximately 45 miles which includes the entire Minneapolis-St. Paul metropolitan area. Petitioner's radio commercials for Dibbo's Bar touted "drink specials" and liquor prices "that are so affordable you can't afford not to be there." The commercials also proclaimed that Dibbo's Bar is located "only five minutes east of St. Paul via I-94." Petitioner spent $11,000 on such radio advertising in 1980, and almost $12,000 in 1981, running between 10 and 15 commercials per week between March 1980 and November 1982. Petitioner purchased a total of $36,496.53 worth of goods and services in Minnesota, including its radio advertising, in 1981.

As Messetler's insurer, BLC paid a total of $66,000 in settlement of the claims made by Messetler's passengers and the driver of the other car. In June 1983 BLC brought this action against petitioner for contribution to these settlements.

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[4]It is unlawful in both Minnesota and Wisconsin for a person to drive or operate a motor vehicle when he or she has a blood alcohol concentration of 0.10 or more. Minn. Stat. § 169.121 subd. 1(d) (1984); Wis. Stat. Ann. § 346.63 subd. 1(b) (West Supp. 1984)

SUMMARY OF ARGUMENT

The opinion of the Minnesota Court of Appeals was consistent with this Court's decisions. The Court of Appeals properly found that Minnesota could exercise *in personam* jurisdiction over the petitioner. The holding of the court below presents no conflict with decisions of other courts because the various decisions are based upon different facts.

ARGUMENT

I.

Petitioner's Contacts With Minnesota Satisfy The Requirements of Due Process.

This Court most recently discussed the Due Process requirements for *in personam* jurisdiction in *Burger King Corp. v. Rudzewicz*, — U.S. —, 105 S.Ct. 2174 (1985). In *Burger King*, which petitioner fails to discuss, the Court set forth a two-step process for determining whether jurisdiction may be exercised.[5] The first step in this analysis is determining whether the defendant has purposefully established "minimum contacts" with the forum state. *Id.* at —; 105 S.Ct. at 2183-84; *see International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). This Court has characterized

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[5]The Minnesota Court of Appeals analyzed the present facts using a five-factor test:

> (1) the quantity of contacts, (2) the nature and quality of contacts, (3) the source and connection of those contacts to the cause of action, (4) the interest of the forum state, and (5) the convenience of the parties.

Pet. App. B-5 (citing *Dent-Air, Inc. v. Beech Mountain Air Service, Inc.*, 332 N.W.2d 904, 907 (Minn. 1983)); *see Aftanase v. Economy Baler Co.*, 343 F.2d 187, 197 (8th Cir. 1965). This test closely parallels the analysis discussed in *Burger King*, with the first three factors corresponding to the "minimum contacts" step in the *Burger King* analysis, and the last two factors corresponding to the second step in *Burger King*.

the "minimum contacts" requirement as foreseeability "that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into Court there." *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 297 (1980). In order for a potential defendant to "reasonably anticipate" litigation in a foreign state, "it is essential . . . that there be some act by which the defendant purposely avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Hanson v. Denckla,* 357 U.S. 235, 253 (1958); *see Burger King Corp. v. Rudzewicz, supra,* at —; 105 S.Ct. at 2183; *World-Wide Volkswagen Corp. v. Woodson, supra,* at 297.

If a defendant has minimum contacts with the forum state, the second step in the *Burger King* analysis permits the court to consider the defendant's contacts in light of other factors such as "the burden on the defendant," "the forum State's interest in adjudicating the dispute," "the plaintiff's interest in obtaining convenient and effective relief," "the interstate judicial system's interest in obtaining the most efficient resolution of controversies," and the "shared interest of the several States in furthering fundamental substantive social policies." *Burger King Corp. v. Rudzewicz, supra,* at —; 105 S.Ct. at 2184 (quoting *World-Wide Volkswagen Corp. v. Woodson, supra,* at 292). These additional considerations "sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required." *Burger King Corp. v. Rudzewicz, supra,* at —; 105 S.Ct. at 2184; *see Keeton v. Hustler Magazine, Inc.,* — U.S. —, 104 S.Ct. 1473, 1479 (1984); *Calder v. Jones,* — U.S. —,

104 S.Ct. 1482, 1487 (1984); *McGee v. International Life Insurance Co.*, 355 U.S. 220, 223-24 (1957).[6]

Burger King permits the exercise of specific jurisdiction "if the defendant has 'purposefully directed' his activities at residents of the forum and the litigation results from alleged injuries that 'arise out of or relate to' those activities." *Burger King Corp. v. Rudzewicz, supra,* at —; 105 S.Ct. at 2182 (quoting *Keeton v. Hustler Magazine, Inc., supra,* at —; 104 S.Ct. at 1478; and *Helicopteros Nacionales de Colombia, S.A. v. Hall,* — U.S. —, 104 S.Ct. 1868, 1872 n. 8 (1984) (*"Helicol"*)). In the present case, petitioner purchased a sizeable amount of goods and services in Minnesota.[7] A significant portion of the services petitioner purchased was radio advertising through which petitioner "deliberately exploited" Minnesota as a market for its by-the-drink liquor business. *See Keeton v. Hustler Magazine, Inc., supra,* at —; 104 S.Ct. at 1481. Petitioner's radio commercials, with their exhortation that petitioner's tavern is "only five minutes east of St. Paul," were "purposefully directed" at Minnesota residents. Moreover, the injuries BLC seeks to redress certainly relate to petitioner's advertising, *see Helicol, supra,* at —, 104 S.Ct. at 1872, as those injuries were suffered in Minnesota by petitioner's Minnesota customers who had learned of or had been lured to petitioner's bar-

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[6] *Burger King* also provided the bar with the further guidance on the Court's use of the terms "specific" and "general" jurisdiction which petitioner suggests is necessary. *Burger King Corp. v. Rudzewicz, supra,* at —; 105 S.Ct. at 2182 and 2182 n. 15.

[7] Petitioner incorrectly claims that the Minnesota Court of Appeals considered petitioner's advertising to be its only contact with Minnesota. *See* Petition for Writ of Certiorari at 10. Just as this court found in *Helicopteros Nacionales de Colombia. S.A. v. Hall,* — U.S. —, 104 S.Ct. 1868, 1874 (1984), the court below held that petitioner's purchases of other goods and services *alone* would not provide a basis for jurisdiction. *See* Pet. App. B-5. It did not rule that such purchases were not being considered in its analysis of petitioner's contacts.

room by petitioner's radio commercials.[8] The suggestion that petitioner's contacts with Minnesota must have some connection based upon an evidentiary standard reads this Court's rulings too narrowly. "In judging minimum contacts, a court properly focuses on 'the relationship among the defendant, the forum, and the litigation.' " *Keeton v. Hustler Magazine, Inc., supra,* at —; 104 S.Ct. at 1478 (quoting *Shaffer v. Heitner,* 433 U.S. 186, 204 (1977)). Requiring such an evidentiary link would tip the balance of this three-sided analysis toward the defendant-litigation relationship, a position this Court has not adopted. *See Helicol, supra,* at —; 104 S.Ct. at 1872; *Calder v. Jones, supra,* at —; 104 S.Ct. at 1486.

Petitioner makes the argument, under several different guises, that it is merely a local Wisconsin business that permits Minnesotans to partake of its alcoholic wares. While it is technically correct that persons such as BLC's insured go to petitioner's tavern rather than vice versa, such a technical argument fails to deal with the reality of petitioner's contacts with Minnesota. Having a large metropolitan area nearby, and a population of Minnesota teenagers who could not legally drink in their home state, petitioner arranged a regular and systematic program of radio advertising to solicit business in Minnesota. Having taken advantage of this lucrative market, it seems somewhat disingenuous to suggest that petitioner could not "reasonably anticipate being haled" into a Minnesota court, especially when it had to know that its Minnesota resident customers would

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[8]Because this matter comes to this Court on a motion by petitioner that must be treated as a motion for summary judgment, *see* footnote 1 *supra,* BLC must be given the benefit of the obvious inference that BLC's insured or his passengers directly or indirectly learned of petitioner's bar through petitioner's advertising. *See Nord v. Herreid,* 305 N.W.2d 337, 339 (Minn. 1981).

return to Minnesota with petitioner's alcoholic products in their bloodstreams.[9]

Having established petitioner's contacts with Minnesota, all of the factors that may be considered in the second step of the *Burger King* analysis overwhelmingly favor Minnesota's exercise of jurisdiction. Minnesota has an obvious and significant interest in providing a forum to redress injuries suffered by its citizens, especially when those citizens are injured in Minnesota in alcohol-related auto accidents. Petitioner's burden in defending this suit is not great; its own radio advertising claims that its place of business is convenient to the Minneapolis-St. Paul metropolitan area where this matter will be tried. No inefficiency occurs by dealing with this case in Minnesota because of petitioner's proximity, and both Minnesota's and Wisconsin's social policies will be served.[10]

Petitioner has made a systematic effort to serve the Minnesota market for its product and that product has been

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[9]Petitioner argues that it is unfair to subject it to suit in Minnesota because it could not foresee such litigation and therefore failed to obtain liability insurance. At the time of the fatal collision giving rise to this case and for several years prior, however, it was Minnesota law that its courts could exercise jurisdiction and apply Minnesota law to a border liquor dealer like petitioner who sold alcoholic beverages to Minnesotans who were later injured in Minnesota. *See Blamey v. Brown*, 270 N.W.2d 884 (Minn. 1978), *cert. denied*, 444 U.S. 1070 (1980), *overruled in part by West American Insurance Co. v. Westin, Inc.*, 337 N.W.2d 676 (Minn. 1983). Given this Minnesota law and petitioner's successful advertising campaign designed to solicit customers in Minnesota, it seems unlikely that petitioner was unable to foresee the possibility of a lawsuit arising out of its liquor sales to Minnesotans.

[10]Both Minnesota and Wisconsin now permit common law causes of action against liquor vendors by persons injured while intoxicated. *See Fitzer v. Bloom*, 253 N.W.2d 395, 403 (Minn. 1977); *Sorensen v. Jarvis*, 119 Wis.2d 627, 629, 350 N.W.2d 108, 117 (1984). When BLC brought this claim in 1983, however, such a cause of action was not recognized in Wisconsin. *See* e.g., *Farmers Mutual Automobile Ins. Co. v. Gast*, 17 Wis.2d 344, 117 N.W.2d 347 (1962), *overruled by Sorensen v. Jarvis, supra*. Such an action by BLC in Wisconsin is now time-barred. *See* Wis. Stat. Ann. § 893.92 (1984).

the source of injury in Minnesota to Minnesota citizens. It was therefore reasonable and proper for Minnesota to exercise jurisdiction over petitioner. *See World-Wide Volkswagen Corp. v. Woodson, supra,* at 297.

II.

There Is No Real Conflict Between This Decision and Decisions of Other Courts.

Petitioner contends that the Minnesota Court of Appeals' decision in the present case is in conflict with the decisions of courts in other jurisdictions, thereby requiring this Court's intervention. It is true that the cases petitioner cites deal with a defendant's advertising contacts with the forum state, and all hold that jurisdiction does not exist. All of petitioner's cases, however, differ from the present case with respect to one very significant fact: None involve an injury that occurred within the forum state.[11] *See Pearrow v. National Life & Accident Insurance Co.,* 703 F.2d 1067, 1068 (8th Cir. 1983); *Scheidt v. Young,* 389 F.2d 58, 59 (3d Cir. 1968); *Orthmann v. Apple River Campground, Inc.,* Civ. No. 4-83-335, slip op. (D. Minn. 1983), *aff'd on other grounds,* 765 F.2d 119 (8th Cir. 1985); *Braasch v. Vail Associates Inc.,* 370 F.Supp. 809, 812-13 (N.D. Ill. 1973); *Circus Circus Hotels, Inc. v. Superior Court,* 120 Cal. App.3d 546, 552, 174 Cal. Rptr. 885, 887 (1981); *Delagi v. Volkswagenwerk AG of Wolfsburg,* 29 N.Y.2d 426, 429, 278 N.E.2d 895, 896, 328 N.Y.S.2d 653, 655 (1972). The fact that the injury occurred in Minnesota "en-

[11]Significantly, in a case similar to the present case in which the injury occurred within California, the California court found that personal jurisdiction existed over an individual whose principal contact with California was his participation in the creation of advertising to be used in that state. *See Davis v. Superior Court,* 62 Cal. Ap.3d 484. 489, 133 Cal. Rptr. 115, 117-18 (1976).

larges its interest in adjudicating the dispute," *World-Wide Volkswagen Corp. v. Woodson, supra,* at 292; and establishes "the reasonableness of jurisdiction [over the petitioner] upon a lesser showing of minimum contacts than would otherwise be required." *Burger King Corp. v. Rudzewicz, supra,* at —; 105 S.Ct. at 2184. Because of the absence of this crucial fact in the cases petitioner cites, their holdings present no real conflict with the Minnesota court's finding in the present case.

CONCLUSION

Respondent BLC urges the Court to deny the Petition for a Writ of Certiorari in this case, or in the alternative, affirm in all respects the Opinion of the Minnesota Court of Appeals.

Respectfully submitted,

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